Supreme Court, U.S.
FILED
FEB 11 1994
OFFICE OF THE CLERK

(3)

No. 93-1288

In The

Supreme Court of the United States

October Term, 1993

JAMES ELLENBECKER, in his capacity as Secretary of the South Dakota Department of Social Services, TERRY WALTER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement,

Petitioners,

v.

VELDA HOWE, THERESA TAKEN ALIVE, on behalf of themselves, their children, and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

B.J. JONES
DAKOTA PLAINS LEGAL SERVICES
P.O. Box 727
Mission, South Dakota 57555
(605) 856-4444

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15pp

QUESTION PRESENTED

WHETHER A STATE'S WHOLESALE DENIAL OF SERVICES MANDATED UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT, IN VIOLATION OF FEDERAL LAW, CAN BE REMEDIED THROUGH A PRIVATE ACTION BROUGHT PURSUANT TO 42 U.S.C. 1983 WHEN NO OTHER ALTERNATIVE ENFORCEMENT MECHANISM IS AVAILABLE?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

STATEMENT OF CASE 2

REASONS FOR DENYING THE WRIT 5

1. BECAUSE THE FEDERAL SECRETARY, WHO IS UNDER AN ORDER FROM THE DISTRICT COURT BELOW TO ENSURE THE PETITIONERS' DELIVERY OF TITLE IV-D SERVICES TO RESPONDENTS, IS NOT A PARTY TO THIS PETITION THE GRANT OF CERTIORARI WOULD BE IMPRUDENT 5

2. THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT'S DECISION IN THIS CASE COMPORTS WITH *SUTER V. ARTIST M.* AND DOES NOT CREATE AN IRRECONCILABLE CONFLICT WITH OTHER CIRCUIT COURT DECISIONS 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES:

Ashcroft v. Mattis, 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d (1977) 6

Beasley v. Harris, 671 F.Supp. 911 (D.Conn. 1987) 9

Behunin v. Jefferson County Dept. of Social Services, 744 F.Supp. 255 (D.Colo. 1990) 9

Carelli v. Howser, 923 F.2d 1208 (6th Cir. 1991) 8, 9

Clifton v. Schaefer, 969 F.2d 278 (7th Cir. 1992) 7, 10

Mason v. Bradley, 789 F.Supp. 273 (N.D.Ill. 1992) 8, 9

Phillips v. New York, 362 U.S. 456 (1960) 5

Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 447 (1970) 8

Stowell v. Ives, 976 F.2d 65 (1st Cir. 1992) 7

Suter v. Artist M., 503 U.S. ___, 112 S.Ct. 1360 (1992) 6, 7, 8, 9

Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989), cert. denied, 494 U.S. 1027 (1990) 8, 9

Wilder v. Virginia Hospital Association, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) 8

Wright v. City of Roanoke Redevelopment Authority, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987) 8

STATUTES:

5 U.S.C. § 702 3

28 U.S.C. § 2412(d) 4

42 U.S.C. § 654(4) 5, 6

42 U.S.C. § 657(B)(1) 10

42 U.S.C. § 671(a)(15) 7

42 U.S.C. § 1983 7

No. 93-1288

In The

Supreme Court of the United States

October Term, 1993

JAMES ELLENBECKER, in his capacity as Secretary of the South Dakota Department of Social Services, TERRY WALTER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement,

Petitioners,

v.

VELDA HOWE, THERESA TAKEN ALIVE, on behalf of themselves, their children, and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

Respondents Velda Howe and Theresa Taken Alive respectfully request that this Court deny the Petitioners' request that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit to review that Court's decision of October 13, 1993 in this matter.

OPINIONS BELOW

The Petitioners have included the opinions of the District Court for the District of South Dakota and the United States Court of Appeals for the Eighth Circuit in their appendix submitted with their petition. It should be noted that the Secretary of the Health and Human Services was a defendant in the district court action, but she chose not to appeal the orders from the district court directed to her.

JURISDICTIONAL STATEMENT

The Respondents concur with the jurisdictional statement of the Petitioners.

STATEMENT OF THE CASE

The Respondents agree that the Petitioners have adequately set out the statutory basis for this case. The factual background set out by the Petitioners, however, needs to be clarified in several respects.

The Respondents asserted in the District Court that the Petitioners failed to adequately provide for the delivery of child support enforcement services to Indian children whose absent parents resided on the nine South Dakota Indian reservations in their Title IV-D plan. The evidence elicited at trial indicated that there were at least 5175 child support enforcement cases which the Petitioners simply closed out without pursuing a support obligation because the absent parent resided in Indian

country. In those cases the Petitioners failed to utilize the various tribal courts in South Dakota nor did they make an attempt to enter into any type of cooperative agreement with the various Indian tribes in South Dakota for the delivery of services to the Respondents.

The Respondents also sued the federal Secretary of Health and Human Services under the Administrative Procedures Act, 5 U.S.C. § 702, claiming that he had failed to properly monitor the Petitioners' compliance with Title IV-D and that his policies with respect to Title IV-D cases in Indian country did not comport with the statutory mandates of Title IV-D and its implementing regulations.

The plights of Respondents Howe and Taken Alive exemplified the predicament facing certain parents of Indian children when they attempted to obtain services from the Petitioners. Absent parents residing outside of Indian country, both Indian and non-Indian, were actively pursued by the Petitioners through legal proceedings commenced in both administrative tribunals and the Circuit Courts of South Dakota by States' Attorneys or Special Attorney Generals for the State. In those cases when a party would request genetic blood testing in state court the Petitioners would arrange for and pay for those tests.

In the cases of the Respondents, however, the Petitioners, with the exception of some informal attempts to have absent parents in Indian country acknowledge paternity and pay support, took little or no action to establish paternity and support orders despite the availability of tribal courts to obtain support orders. Some of

the Respondents even had their AFDC benefits terminated because they failed to commence child support actions *pro se*. Even when one of the Respondents would commence a *pro se* action in the appropriate tribal court the Petitioners would not pay for the genetic blood testing in the tribal court leaving the case at a standstill.

In South Dakota alone of the 23,000 absent parents the Petitioners were pursuing for child support 5171 were reservation-domiciled Indians. Yet in 1990 the Petitioners collected $12,400,000.00 from child support obligors but only $12,111.90 of that was collected from reservation-domiciled Indians through the utilization of tribal courts by the Respondents without the aid of Petitioners.

The Petitioners, at pages 18-19 of their petition, assert that they were in total compliance with the federal Secretary's policies governing the delivery of Title IV-D services to the Respondents. **Those policies, however, were struck down by the District Court in its September 18, 1991 memorandum decision, App. 65-68, as violative of Title IV-D.**[1] That decision was not appealed by the federal Secretary, nor were any of the orders requiring the federal Secretary to assure that the Petitioners provide services to the Respondents, App. 101-103.

[1] The District Court also found that the Secretary's position in the litigation below was not substantially justified and therefore assessed attorney's fees against the Secretary under 28 U.S.C. § 2412(d).

REASONS FOR DENYING THE WRIT

1. BECAUSE THE FEDERAL SECRETARY, WHO IS UNDER AN ORDER FROM THE DISTRICT COURT BELOW TO ENSURE THE PETITIONERS' DELIVERY OF TITLE IV-D SERVICES TO RESPONDENTS, IS NOT A PARTY TO THIS PETITION THE GRANT OF CERTIORARI WOULD BE IMPRUDENT

This Court should not grant the petition for a writ of certiorari because review by this Court would not be dispositive of the litigation below. In such a circumstance the granting of certiorari would be imprudent because this Court would be opining on a legal question, whether Title IV-D can be enforced through a 1983 action, the answer to which would not relieve the Petitioners of their obligation to comply with the District Court orders below. *See, Phillips v. New York,* 362 U.S. 456 (1960).

The Petitioners must operate their Title IV-D program in compliance with federal laws and regulations which are promulgated by the federal Secretary of Health and Human Services. *See,* 42 U.S.C. § 654(4). In the proceedings below the federal district court invalidated one of the federal Secretary's policies regarding the delivery of Title IV-D services to Respondents and ordered the Secretary and Petitioners to attempt to negotiate cooperative agreements with Indian Tribes in South Dakota without mandating that the Tribes enact the full panoply of laws required to be enacted by a State which opts to operate a Title IV-D program. App. 101-103. That order was appealed by the federal Secretary, but the appeal was subsequently abandoned. Because of that the Secretary is

under a court-imposed obligation to require the Petitioners to provide Title IV-D services to the Respondents through the negotiation of cooperative agreements under the terms stated by the district court.

The remedy ordered by the district court will have to be implemented by the Petitioners, in accordance with 42 U.S.C. § 654(4), notwithstanding any ruling from this Court on the availability of a 1983 remedy for a Title IV-D violation. Petitioners are essentially requesting that this Court find that no privately enforceable right exists in the Title IV-D arena for the sake of future litigation and not to relieve them from liability in complying with the district court's orders in this case. This would be tantamount to an advisory opinion which this Court frowns upon. *Ashcroft v. Mattis,* 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977).

The petition should be denied as the resolution of the issue presented by the petition would serve no purpose in this case.

2. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DECISION IN THIS CASE COMPORTS WITH *SUTER V. ARTIST M.* AND DOES NOT CREATE AN IRRECONCILABLE CONFLICT WITH OTHER CIRCUIT COURT DECISIONS

The challenge to the Petitioners' operation of their Title IV-D program, mounted by the Respondents in the Courts below, qualitatively differs from the litigation commenced by the Plaintiffs in *Suter v. Artist M.*, 503 U.S. ___, 112 S.Ct. 1360 (1992). In *Suter* parents of abused or

neglected children claimed that they had a right to sue Illinois officials, under 42 U.S.C. § 1983, for their alleged failure to exercise reasonable efforts in reuniting families as required by the Adoption Assistance and Child Welfare Act. *See,* 42 U.S.C. § 671(a)(15). This Court noted that Illinois, in its compliance plan submitted to the federal Secretary of Health and Human Services, provided for the utilization of reasonable efforts to reunite children with their families. The term, "reasonable efforts", was not sufficiently fleshed out by the statute and implementing regulations to apprise states of what standards they would be subjected to in judging their compliance with the mandate. This Court therefore held that a private litigant should not be entitled to utilize 1983 to enforce amorphous precepts which were not "unambiguously" created in the statute. *Suter,* 112 S.Ct. 1366-67.

Conversely, this case involves a challenge to a State's failure to provide in its compliance plan for the provision of Title IV-D services to a large segment of the South Dakota population. This would be equivalent, in the *Suter* scenario, to the State of Illinois not providing for reasonable efforts to reunite a large percentage of the children it maintained in foster care with their families in its state compliance plan. Such an omission would clearly be cognizable under 42 U.S.C. § 1983. *See, Stowell v. Ives,* 976 F.2d 65 (1st Cir. 1992); *Clifton v. Schaefer,* 696 F.2d 278, 285 (7th Cir. 1992) (*Suter* stands for the proposition that a party cannot challenge the manner by which a state is implementing a plan approved by the Secretary under 1983 but can challenge the inadequacy of the plan itself.)

The Petitioner's attempt to fall under the cloak of the *Suter* ruling by contending that it was, at all relevant

times, in compliance with the federal Secretary's policies regarding the delivery of Title IV-D services is a *non sequitur.* The Secretary's policies themselves were violative of Title IV-D; the state plan the petitioners had in place was, as a result, necessarily defective because it was grounded upon faulty federal policy.

This Court in *Suter* expressed no intention to repudiate this Court's previous rulings in *Wilder v. Virginia Hospital Association,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) and *Wright v. City of Roanoke Redevelopment Authority,* 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987). *Suter,* at 1367. The Petitioners would have this Court conclude that 1983 is never available to a litigant to remedy an alleged violation of a federal entitlement program, enacted pursuant to Congress' spending powers, if the federal agency overseeing the state operation of the program does not demand perfect compliance with federal regulations. *See, Mason v. Bradley,* 789 F.Supp. 273 (N.D. Ill. 1992). Such an interpretation of *Suter* tacitly overrules *Wilder, Wright* and *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 447 (1970) and would leave litigants such as the Respondents here with no federal forum to challenge a blatant denial of services to a substantial number of eligible recipients of federal programs.

All of the cases in which the federal courts have concluded that a 1983 cause of action does not lie to remedy an alleged violation of Title IV-D of the Social Security Act involved challenges to the respective states' operations of their Title IV-D plans, not challenges to the legality of the state plans. *See, Wehunt v. Ledbetter,* 875 F.2d 1558 (11th Cir. 1989), *cert. denied,* 494 U.S. 1027 (1990); *Carelli v. Howser,* 923 F.2d 1208 (6th Cir. 1991);

Mason v. Bradley, 789 F.Supp. 273 (N.D. Ill. 1993). Of those cases only the *Wehunt* court concluded that Title IV-D did not create privately-enforceable rights in the recipients of Title IV-D services. Other Courts, in rejecting the *Wehunt* analysis, have concluded that Title IV-D did intend to benefit persons such as the Respondents and it therefore could be enforced through a 1983 action. *Carelli, supra; Behunin v. Jefferson County Department of Social Services,* 744 F.Supp. 255 (D. Colo. 1990); *Beasley v. Harris,* 671 F.Supp. 911 (D. Conn. 1987).

The *Wehunt* Court's analysis does differ from the approach taken by the Court below in that the Eighth Circuit did conclude that Title IV-D does vest private litigants with rights that can be enforced under 1983. *Wehunt* holds that Title IV-D was not enacted to benefit persons such as the Respondents here. *Wehunt* was decided before this Court's decisions in *Wilder* and *Suter* and the Eleventh Circuit therefore did not have the benefit of the analytical framework set out in those cases to assess the availability of a 1983 remedy for a Title IV-D violation. Indeed, *Wehunt* has proved to be an anomaly with no other federal court embracing its logic under the *Wilder* and *Suter* analysis. Because *Wehunt* has been largely discredited by post-*Wilder* and *Suter* decisions and because the unique facts in this case distinguish it from the other Title IV-D challenges the granting of certiorari would not enlighten inferior courts confronted with challenges to the manner in which States operate their Title IV-D programs.

The *Wehunt* Court's conclusion that Title IV-D was intended to offset the costs of welfare benefits and not to benefit AFDC families is also patently contrary to the

statute itself. If the Petitioners had assisted the Respondents in obtaining paternity adjudications and support orders their families would not only have reaped the benefits from the establishment of paternity, which for Indian children may be the only way a child can be enrolled with an Indian Tribe, but would have supplemented their meager incomes with an extra $50.00 per month. *See*, 42 U.S.C. § 657(B)(1). Even $50.00 per month would be of great assistance to the Respondents some of whom reside in the poorest counties in the United States.

Finally, the Petitioners' contention that the Eighth Circuit's opinion below has opened the federal courthouse doors to every litigant dissatisfied with the manner in which a State collects her child support is a serious distortion of the Court's holding. This is not a case where a single, disgruntled litigant objects to the state's implementation of an otherwise valid plan to deliver child support services to state residents. *See, e.g., Clifton v. Schaefer*, 969 F.2d 278 (7th Cir. 1992). Instead, the Petitioners' state plan excluded the delivery of services to a large percentage of the South Dakota population in clear and undisputed violation of the federal statute. The Federal Secretary was in no position to remedy this violation of the law because her policies, at the time, transgressed the statute. In such a case the only possible remedy to correct both a state and federal misapplication of federal law is a 1983 action with the *Suter* case as an appropriate benchmark for determining whether such a cause of action lies. A review of the post-*Suter* litigation reveals that the federal courts are already stringently applying *Suter* and further clarification would be unwarranted at this time.

CONCLUSION

For the foregoing reasons this Court should deny the petition for a writ of certiorari. The grant of the writ would not tend to resolve the dispute below because of the federal Secretary's absence from this litigation. Additionally, because this case involves a challenge to a State's plan for providing Title IV-D services to its residents, instead of a challenge to the manner in which a plan is implemented, the decision below does not conflict with other Circuit and district court opinions discussing the availability of a 1983 remedy to redress Title IV-D violations.

Respectfully submitted

B.J. JONES
Attorney for Respondents
P.O. Box 727
Mission, S.D. 57555